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3 IN THE UNITED STATES DISTRICT COURT  
4

5 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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7 MIKESHA MARTINEZ, et al.,  
8 Plaintiffs,  
9 v.  
10 ARNOLD SCHWARZENEGGER, et al.,  
11 Defendants.

No. C 09-02306 CW

ORDER DENYING FRESNO  
DEFENDANTS' MOTION  
TO DISMISS AND SEVER

12 Plaintiffs, In-Home Support Services (IHSS) consumers and  
13 unions representing IHSS providers, filed suit against various  
14 state officials (State Defendants) and against Fresno County and  
15 Fresno County In-Home Support Services Public Authority (Fresno  
16 Defendants) seeking to enjoin reductions in IHSS providers' wages  
17 and benefits. Fresno Defendants have filed a motion to dismiss the  
18 claims against them, asserting that Plaintiffs lack standing to  
19 bring, and fail to state, a claim for relief against them. Fresno  
20 Defendants have also moved to sever the claims asserted against  
21 them from the claims against State Defendants. Plaintiffs oppose  
22 the motions. The matter was heard on September 17, 2009. Having  
23 considered oral argument and all of the papers submitted by the  
24 parties, the Court denies the motions to dismiss and sever.

25 BACKGROUND  
26

27 IHSS providers give in-home assistance to low-income elderly  
28 and disabled individuals through California's Medi-Cal program.

1 The cuts to their wages were scheduled to go into effect July 1,  
2 2009. Plaintiffs filed this complaint on May 26, 2009.

3 Plaintiffs' complaint asserts four claims for relief. The  
4 first two claims, asserted only against State Defendants, challenge  
5 Welfare and Institutions Code § 12306.1(d)(6) as violative of the  
6 federal Medicaid Act. The third and fourth claims, asserted  
7 against both State Defendants and Fresno Defendants, bring  
8 challenges under the Americans with Disability Act (ADA), 42 U.S.C.  
9 § 12132 and the Rehabilitation Act, 29 U.S.C. § 794(a). In these  
10 claims, Plaintiffs allege that reducing the wages and benefits of  
11 IHSS providers will create a shortage of providers and that some  
12 IHSS consumers will be unable safely to remain at home without IHSS  
13 services and will be forced to enter nursing homes or other  
14 residential institutions. Plaintiffs claim that this violates the  
15 anti-discrimination provisions of the ADA and the Rehabilitation  
16 Act. "Unjustified isolation [of people with disabilities] . . . is  
17 properly regarded as discrimination based on disability." Olmstead  
18 v. L.C. ex rel. Zimring, 527 U.S. 581, 597 (1999).

19 On June 4, Plaintiffs filed a motion for a preliminary  
20 injunction based on all four claims for relief. On June 26, the  
21 Court issued a preliminary injunction enjoining implementation of  
22 Section 12306.1(d)(6) based on Plaintiffs' first claim for relief.  
23 The Court concluded that the statute violated the procedural  
24 requirements of the federal Medicaid Act. The Court noted:

25 IHSS consumers will suffer immediate and irreparable harm  
26 unless the Court issues a preliminary injunction. The wage  
reductions will cause many IHSS providers to leave employment,  
which in turn will leave consumers without IHSS assistance.  
27 The consumers' quality of life and health-care will be greatly  
diminished, which will likely cause great harm to disabled  
28 individuals. For instance, the declarations submitted by

1 Plaintiffs describe harms ranging from going hungry and  
2 dehydration, to falls and burns, to an inability ever to leave  
3 the home. Institutionalizing individuals that can comfortably  
4 survive in their home with the help of IHSS providers will  
5 "cause Plaintiffs to suffer injury to their mental and  
6 physical health, including a shortened life, and even death  
7 for some Plaintiffs." Crabtree v. Goetz, 2008 WL 5330506, at  
8 \*30 (M.D. Tenn.).

9 Order Granting Preliminary Injunction at 10-11. The Court did not  
10 rule on Plaintiffs' likelihood of success on their second, third or  
11 fourth claims for relief. Id. at 10.

12 In a later order clarifying the preliminary injunction, the  
13 Court explained that the injunction required State Defendants to  
14 "rescind the State's approval of all county wage reduction requests  
15 which were submitted after February 20, 2009, to be effective July  
16 1, 2009." Amended Prelim. Inj. at 2. Fresno Defendants then asked  
17 the State not to rescind its approval of their wage reduction  
18 request. They wrote a letter to California Department of Social  
19 Services (CDSS), which stated that, in addition to reducing their  
20 rate in response to Section 12306.1(d)(6), they had a separate and  
21 independent reason for reducing the rate. They claimed that they  
22 based the reduction on a section of the contractual Memorandum of  
23 Understanding (MOU) entered into between the County of Fresno and  
24 Plaintiff Service Employees International Union United Healthcare  
25 Workers West in September, 2006. The MOU provides for the  
26 possibility of a rate reduction if Fresno County's funding from the  
27 Realignment Act were reduced.<sup>1</sup> The Court held that the letter  
28 "merely expresses a second reason for [Fresno's] initial rate  
change request submitted on April 30, 2009" and "does not

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27 <sup>1</sup>Realignment Act funding comes from 1991 legislation that  
28 increased sales taxes and vehicle license fees for specific social  
services and mental health and health programs.

1 constitute a second rate change request." Order Further Clarifying  
2 Inj. at 6. The Court concluded, "Before the State may approve a  
3 rate reduction for . . . Fresno County, it must receive from the  
4 County a new and separate written request conforming to all the  
5 requirements of law and regulation, based on a reason other than  
6 § 12306.1(d)(6)." Id. at 7.<sup>2</sup> No evidence of such a request has  
7 been submitted to date.

8 DISCUSSION

9 I. Subject Matter Jurisdiction

10 Subject matter jurisdiction is a threshold issue which goes to  
11 the power of the court to hear the case. Federal subject matter  
12 jurisdiction must exist at the time the action is commenced.

13 Morongo Band of Mission Indians v. Cal. State Bd. of Equalization,  
14 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed  
15 to lack subject matter jurisdiction until the contrary  
16 affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873  
17 F.2d 1221, 1225 (9th Cir. 1989).

18 Dismissal is appropriate under Rule 12(b)(1) when the district  
19 court lacks subject matter jurisdiction over the claim. Fed. R.  
20 Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either attack the  
21 sufficiency of the pleadings to establish federal jurisdiction, or  
22 allege an actual lack of jurisdiction which exists despite the  
23 formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen.  
24 Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v.  
25 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

26 \_\_\_\_\_  
27 <sup>2</sup>The Court grants Fresno Defendant's request to take judicial  
28 notice of the publications submitted by federal, state, local  
officials and agencies.

## 1           A.     Standing

2           "Because standing and mootness both pertain to a federal  
3 court's subject-matter jurisdiction under Article III [of the  
4 Constitution], they are properly raised in a motion to dismiss  
5 under Federal Rule of Civil Procedure 12(b)(1)." White v. Lee, 227  
6 F.3d 1214, 1242 (9th Cir. 2000). Article III limits the  
7 jurisdiction of the federal courts to "cases" and "controversies."  
8 In order to satisfy the "case or controversy" requirement, a  
9 plaintiff must show that: "(1) he or she has suffered an injury in  
10 fact that is concrete and particularized, and actual or imminent;  
11 (2) the injury is fairly traceable to the challenged conduct; and  
12 (3) the injury is likely to be redressed by a favorable court  
13 decision." Salmon Spawning & Recovery Alliance v. Gutierrez, 545  
14 F.3d 1220, 1225 (9th Cir. 2008). "Article III standing requires an  
15 injury that is actual or imminent, not conjectural or  
16 hypothetical." Cole v. Oroville Union High Sch. Dist., 228 F.3d  
17 1092, 1100 (9th Cir. 2000) (internal quotation marks omitted). A  
18 plaintiff seeking declaratory and injunctive relief cannot rely  
19 solely on a past injury; instead, he or she must demonstrate a  
20 "very significant possibility of future harm" to warrant the  
21 requested relief. San Diego County Gun Rights Comm. v. Reno, 98  
22 F.3d 1121, 1126 (9th Cir. 1996).

23           A standing challenge can be either "facial" or "factual."  
24 White v. Lee, 227 F.3d at 1242. A "facial" attack challenges a  
25 complaint on its face and the court generally assumes the truth of  
26 the allegations asserted therein. Id. In a "factual" attack, the  
27 court "may look beyond the complaint to matters of public record  
28 without having to convert the motion into one for summary judgment"

1 and it "need not presume the truthfulness of the plaintiffs'  
2 allegations." Id.

3 Fresno Defendants assert that Plaintiffs' complaint on its  
4 face does not allege injury and causation. Fresno Defendants argue  
5 that Plaintiffs "set forth wild prognostications of future harm  
6 based only upon conjecture and surmise." Motion at 9. The Court  
7 disagrees. Plaintiffs have alleged that Fresno Defendants'  
8 reduction of IHSS provider wages and benefits will cause  
9 unjustified institutionalization of IHSS consumers. For instance,  
10 the complaint alleges:

11 In the counties in which wages will be reduced, many IHSS  
12 providers will be forced to leave IHSS employment to seek  
13 higher paying jobs. Not all the vacancies created by IHSS  
providers leaving their employment will be filled with new  
IHSS providers.

14 As a result of these vacancies, many IHSS consumers in  
15 these counties will be unable to find providers for any or all  
16 of their authorized IHSS hours. These consumers will either  
have to make do with reduced or eliminated IHSS services, or  
be forced to enter nursing homes or other residential  
institutions.

17 Complaint ¶¶ 58-59. These allegations on their face satisfy the  
18 standing requirements.

19 Fresno Defendants also mount a factual standing challenge.  
20 They argue that Plaintiffs cannot show redressability because the  
21 MOU provides a separate and distinct contingency clause for the  
22 reduction of Fresno County IHSS provider compensation. Fresno  
23 Defendants assert that the terms of the MOU control the present  
24 dispute and that Plaintiffs' injury cannot be redressed by this  
25 lawsuit. However, the MOU has little bearing on Plaintiffs'  
26 standing because the reason for Fresno Defendants' attempt to  
27 reduce IHSS provider wages is less relevant to Plaintiffs' third  
28

1 and fourth claims for relief than the actual impact of the wage  
2 reduction.

3 Further, Fresno Defendants have not yet submitted a separate  
4 rate reduction request to the State based on the MOU. Standing is  
5 measured at the commencement of a lawsuit, Friends of the Earth,  
6 Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000), and  
7 at the commencement of the present lawsuit, Fresno Defendants had  
8 submitted a single rate change request based on Section  
9 12306.1(d)(6). The State's approval of that rate change request  
10 was rescinded by the Court's preliminary injunction and subsequent  
11 orders clarifying the injunction. Fresno Defendants' intent to  
12 submit a future rate change request based on the MOU is not  
13 relevant at this juncture.

14 The Court also notes that Fresno Defendants' reliance on  
15 Pritikin v. Department of Energy, 254 F.3d 791 (9th Cir. 2001), and  
16 San Diego County Gun Rights, 98 F.3d 1121, is misplaced. In these  
17 cases, conduct by an entity which was not a party to the litigation  
18 would have been required to redress the plaintiffs' injuries. The  
19 plaintiffs lacked standing because the court lacked authority to  
20 issue an order to the relevant entity. Pritikin, 254 F.3d at 801  
21 ("Pritikin has failed to show how ordering [defendant] DOE to  
22 request funding would lead to the tangible result of a Hanford  
23 medical monitoring program when only [non-party] ATSDR has the  
24 power to actually initiate the program."); San Diego County Gun  
25 Rights, 98 F.3d at 1130 ("[I]t is third-party weapons dealers and  
26 manufacturers -- not the government defendants -- who have raised  
27 the prices of assault weapons [thereby injuring the plaintiffs].").  
28 Here, Fresno Defendants are parties to this lawsuit and Plaintiffs'

1 claims against them can adequately be redressed.

2 II. Motion to Dismiss for Failure to State a Claim

3 A. Legal Standard

4 A complaint must contain a "short and plain statement of the  
5 claim showing that the pleader is entitled to relief." Fed. R.  
6 Civ. P. 8(a). When considering a motion to dismiss under Rule  
7 12(b)(6) for failure to state a claim, dismissal is appropriate  
8 only when the complaint does not give the defendant fair notice of  
9 a legally cognizable claim and the grounds on which it rests.

10 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In  
11 considering whether the complaint is sufficient to state a claim,  
12 the court will take all material allegations as true and construe  
13 them in the light most favorable to the plaintiff. NL Indus., Inc.  
14 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this  
15 principle is inapplicable to legal conclusions; "threadbare  
16 recitals of the elements of a cause of action, supported by mere  
17 conclusory statements," are not taken as true. Ashcroft v. Iqbal,  
18 \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550  
19 U.S. at 555).

20 B. Analysis

21 Fresno Defendants argue that Plaintiffs fail to state claims  
22 under the ADA and the Rehabilitation Act. Title II of the ADA  
23 provides that "no qualified individual with a disability shall, by  
24 reasons of such disability, be excluded from participation in or be  
25 denied the benefits of the services, programs, or activities of a  
26 public entity, or be subjected to discrimination by any such  
27 entity." 42 U.S.C. § 12132. Similarly, the Rehabilitation Act  
28 (RA) states, "No otherwise qualified individual with a disability

1 in the United States . . . shall, solely by reason of her or his  
2 disability, be excluded from the participation in, be denied the  
3 benefits of, or be subjected to discrimination under any program or  
4 activity receiving Federal financial assistance . . ." 29 U.S.C.  
5 § 794(a).<sup>3</sup> The integration mandate provides: "A public entity  
6 shall administer services, programs, and activities in the most  
7 integrated setting appropriate to the needs of qualified persons  
8 with disabilities." 28 C.F.R. § 35.130(d). The unjustified  
9 institutional isolation of persons with disabilities is "properly  
10 regarded as discrimination based on disability" because it  
11 perpetuates unwarranted assumptions and diminishes participation in  
12 everyday life activities. Olmstead v. L.C. ex rel. Zimring, 527  
13 U.S. 581, 597 (1999).

14 To state a valid claim under either the ADA or Rehabilitation  
15 Act, a plaintiff must allege that he or she (1) is a qualified  
16 individual with a disability; (2) was either excluded from  
17 participation in or denied the benefits of a public entity's  
18 services, programs or activities or was otherwise discriminated  
19 against by the public entity; and (3) that such exclusion, denial  
20 of benefits, or discrimination was by reason of his or her  
21 disability. Duval v. County of Kitsap, 260 F.3d 1124, 1135 (9th  
22 Cir. 2001).

23 Fresno Defendants argue that Plaintiffs' claims cannot be  
24 brought under these statutes because they are essentially  
25 employment actions. See Zimmerman v. Oregon Dept. of Justice, 170

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27 <sup>3</sup>The Court will address the ADA and RA claims together because  
28 there is no substantial difference in the analysis of the rights  
and obligations created by the provisions.

1 F.3d 1169, 1173 (9th Cir. 1999) ("Congress unambiguously expressed  
2 its intent for Title II [of the ADA] not to apply to employment.").  
3 However, Fresno Defendants ignore the fact that the third and  
4 fourth causes of action in this case are not asserted by the wage-  
5 earners, but rather by the people with disabilities -- IHSS  
6 consumers -- to challenge discrimination in the provision of  
7 services. The fact that the cause of the alleged discrimination  
8 involves wages paid to IHSS providers does not transform  
9 Plaintiffs' disability discrimination claims into employment  
10 disputes.

11 Fresno Defendants also assert that, because Plaintiffs seek to  
12 prevent Fresno Defendants from reducing IHSS provider wages,  
13 Plaintiffs' claims have nothing to do with discrimination on the  
14 basis of disability. They rely on Weinreich v. Los Angeles County  
15 Metro. Transp. Auth., 114 F.3d 976 (9th Cir. 1997), to support  
16 their argument. In Weinreich, the plaintiff challenged his  
17 exclusion from a reduced transit fare program for disabled persons  
18 on the basis that he could not afford to pay a doctor to certify  
19 his disability, which was required by the program. Id. at 978.  
20 The Ninth Circuit held that the Transportation Authority's duty to  
21 provide "reasonable accommodations" did not apply where the barrier  
22 to the plaintiff's participation was not his disability, but rather  
23 his financial constraints. Id. Fresno Defendants claim that, like  
24 the plaintiff in Weinreich, Plaintiffs in this case have not been  
25 discriminated against because the County of Fresno is merely  
26 effectuating a budgetary decision, not denying services under the  
27 IHSS program. The Court disagrees. Plaintiffs allege that the  
28 implementation of Section 12306.1(d)(6) and associated wage

1 reductions will force Plaintiffs who wish to remain in their homes,  
2 and are able to do so with the help of in-home care, to enter  
3 institutions. Plaintiffs depend upon the services of IHSS  
4 providers in order to maintain their social and economic  
5 independence. These allegations sufficiently state disability  
6 discrimination claims under Olmstead.

7 III. Motion to Sever

8 Federal Rule of Civil Procedure 21 provides, "On motion or on  
9 its own, the court may at any time, on just terms, add or drop a  
10 party. The Court may also sever any claim against a party." A  
11 court, in its discretion, may sever parties, "so long as no  
12 substantial right will be prejudiced by the severance." Coughlin  
13 v. Rogers, 130 F.3d 1348, 1350 (9th Cir. 1997). The court may  
14 sever the claims against a party in the interest of fairness and  
15 judicial economy and to avoid prejudice, delay or expense. Coleman  
16 v. Quaker Oats Co., 232 F.3d 1271, 1296-97 (9th Cir. 2000).

17 Fresno Defendants move the Court to sever the claims against  
18 them from the claims against State Defendants. They argue that the  
19 claims against them require factual determinations specific only to  
20 Fresno County and not State Defendants. They assert that, even  
21 though Fresno County is the only county named as a Defendant in  
22 this case, a county-by-county inquiry must be made to determine  
23 whether any reduction in hourly wages paid to IHSS providers will  
24 lead to the loss of IHSS providers to the point where IHSS  
25 customers will be institutionalized. Fresno Defendants state,  
26 "Because an individualized analysis is required to determine each  
27 counties' liability, severance will allow for a more focused  
28 analysis, consistent with fairness and will avoid prejudice and

1 delay to all parties involved." Motion at 10.

2       Although the litigation may require some Fresno-specific  
3 analyses, the Olmstead claims against State Defendants and Fresno  
4 Defendants involve numerous overlapping questions of law. The  
5 legal claims asserted against State Defendants and Fresno  
6 Defendants are the same -- that the reduction of IHSS provider  
7 wages will result in the unjustified institutionalization of IHSS  
8 consumers. Further, any fact specific inquiry into Fresno County  
9 will inform Plaintiffs' Olmstead claims against State Defendants.  
10 Thus, judicial economy will be served by considering Plaintiffs'  
11 claims against Fresno Defendants in conjunction with their claims  
12 against State Defendants. Requiring separate trials on these  
13 claims would likely waste judicial resources and risk creating  
14 inconsistent results.

15       Fresno Defendants also argue that severing the claims and  
16 transferring them to the Eastern District of California would be  
17 more convenient and less expensive for all parties because that is  
18 where Fresno Defendants, and some of the providers and recipients  
19 of care, reside. However, severing the claims against Fresno  
20 Defendants might also create a burden on Plaintiffs who reside in  
21 Fresno because they would be forced to litigate the same claims in  
22 two separate forums.

23       Fresno Defendants also assert that the existence of the  
24 provision in the MOU that allows for a reduction in IHSS wages in  
25 response to losses of Realignment Act funding provides a unique  
26 relationship between Fresno Defendants and IHSS providers. The  
27 loss of Realignment Act funding can justify a wage reduction  
28 irrespective of Section 12306.1(d)(6). However, at this juncture,

1 the only rate reduction request submitted to the State by Fresno  
2 Defendants was based on Section 12306.1(d)(6). Speculation about  
3 what Fresno Defendants may do in the future with respect to IHSS  
4 provider wages cannot provide the basis for severance.

5 Plaintiffs' claims against Fresno Defendants will not be  
6 severed. However, the Court will revisit this issue if, as the  
7 case develops, new facts arise that tip the balance in favor of  
8 severance.

9 CONCLUSION

10 For the foregoing reasons, the Court denies Fresno Defendants'  
11 motions to dismiss or sever the claims against them. Fresno  
12 Defendants shall answer Plaintiffs' complaint within twenty days  
13 from the date of this order.

14 IT IS SO ORDERED.

15 Dated: 10/15/09



16 CLAUDIA WILKEN  
17 United States District Judge

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